RECORD AND BRIEF

No. 16-309

Supreme Court, U.S.
FILED
MAR - 6 2016
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

DIVNA MASLENJAK,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF *AMICI CURIAE* FOR IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS' GUILD IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are legal organizations that provide specialized assistance to lawyers and immigrants on issues that include naturalization and the intersection of immigration and criminal laws. *Amici* are deeply concerned that the standard proposed by the government would place naturalized citizens and their families at risk in ways that could not possibly have been intended by Congress.

The Immigrant Defense Project ("IDP") is a nonprofit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that affect the rights of naturalized immigrants accused of criminal conduct relating to their applications for naturalization and consequently at risk of denaturalization. IDP has submitted *amicus curiae* briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015);

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[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief pursuant to Rule 37.3(a).

*Vartelas v. Holder*, 566 U.S. 257 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289 (2001).

The Immigrant Legal Resource Center ("ILRC") trains attorneys, paralegals, and community-based advocates who work with immigrants around the country. The ILRC informs the media, elected officials, and public to shape effective and just immigration policy and law. It works with grassroots immigrant organizations to promote civic engagement and social change. Critically, the ILRC leads the New Americans Campaign, a groundbreaking, nonpartisan national network of 120 legal-service providers, faith-based organizations, businesses, foundations and community leaders that is paving a better road to citizenship by facilitating nationwide naturalization trainings, clinics, and workshops. Moreover, the ILRC is the author of one of the most comprehensive immigration law guides to naturalization, *Naturalization and U.S. Citizenship: The Essential Legal Guide* and is deeply embedded in providing technical assistance to immigration lawyers and representatives working on naturalization issues.

The National Immigrant Justice Center ("NIJC") is a Chicago-based nonprofit, accredited since 1980 by the Board of Immigration Appeals to represent individuals in immigration matters. Through its staff and network of more than 1,500 pro bono attorneys, NIJC has a long history of representing low-income immigrants seeking to naturalize, as well as advising

defense counsel regarding the effects on criminal convictions. NIJC therefore has a deep interest in the due process implications of denaturalization.

The National Immigration Law Center ("NILC") is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce the values of equality, opportunity, and justice. NILC has earned a national leadership reputation for its expertise in the rights of immigrants, including litigating key due process cases to protect the rights of noncitizens.

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a national nonprofit membership organization that provides legal and technical support to attorneys, legal workers, immigrant communities, and advocates seeking to advance the rights of noncitizens. For more than 30 years, the NIPNLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct. It writes *Immigration Law and Crimes*, *U.S. Citizenship and Naturalization Handbook*, and three other treatises published by Thompson-Reuters. The NIPNLG also has participated as *amicus curiae* in significant immigration-related cases before this Court in, among others: *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Mata v. Lynch*, 135 S. Ct. 2150 (2015); and *United States v.*

*Mendoza-Lopez*, 481 U.S. 828 (1987). The NIPNLG presents this brief to assist the Court in its consideration of this case because it has substantial expertise in the issue presented here.

## SUMMARY OF ARGUMENT

In this case, the government seeks the power to secure a conviction under 18 U.S.C. § 1425(a), thereby subjecting a naturalized U.S. citizen to both criminal penalties and mandatory denaturalization, without being required to prove that a misrepresentation in a naturalization application was in any way material to the granting of citizenship. Stripping citizenship on the basis of a misrepresentation, no matter how minor or unrelated to the qualifications for citizenship, is a draconian result that is in tension with this Court's recognition that "naturalization decrees are not lightly to be set aside." *Costello v. United States*, 365 U.S. 265, 269 (1961) (internal quotation omitted).

The power that the government seeks must be considered in light of the vast amount of information it seeks in applications for naturalization and the high likelihood that the answers to one of the many questions on the form will not be accurate. Indeed, the sweep of the form – asking for details of personal information, associations and acts that cover the applicant's lifetime and may involve information that is private or embarrassing – makes it highly likely that the government's proposed standard would place large numbers

of naturalized citizens at risk of losing their citizenship at the hands of an aggressive prosecutorial policy. Under the government's standard, applicants who overstate their height or understate their weight would be at risk, as would be those who leave out mention of an organizational affiliation, such as involvement in an organization on one or another side of LGBTQ or abortion rights issues. Under the government's standard, these types of statements would be grounds for jailing naturalized citizens and stripping them of their citizenship, even when they are immaterial to the case and would be inadequate grounds for denying citizenship in the first place.

Read correctly, section 1425(a) does not grant such sweeping powers. First, as petitioner argues, the statute limits prosecution to those who have procured naturalization unlawfully, thereby implicitly requiring materiality in any false statement. Second, there can be no tradeoff between substantive and procedural protections of citizenship. Because the substantive standard for civil denaturalization for a false statement requires materiality, the criminal statute must require at least the same level of culpability. Finally, even if some civil denaturalizations do not require a showing of materiality, materiality must be shown in a criminal case where the parallel civil statute requires materiality. Therefore the ruling of the Sixth Circuit should be reversed.

## ARGUMENT

### I. The standard proposed by the government would have far reaching criminal and denaturalization consequences for naturalized citizens who made innocuous and immaterial false statements in their naturalization applications.

As this Court has long recognized, "American citizenship is a precious right," and thus "naturalization decrees are not lightly to be set aside." *Costello v. United States*, 365 U.S. 265, 269 (1961) (internal quotation omitted). Simultaneously, this Court has acknowledged the gravity of the power to designate activity criminal and worthy of imprisonment: "With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power?" *Weems v. United States*, 217 U.S. 349, 372-73 (1910). The criminal denaturalization statute, 18 U.S.C. § 1425(a), by combining both criminal sanctions and the stripping of citizenship, must be read with at least as much caution as statutes that levy only one of these powerful sanctions.[2]

The government's proposed standard would threaten the liberty and citizenship of countless naturalized

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[2] 18 U.S.C. § 1425(a) authorizes prison sentences of 10-25 years.

citizens. In the last decade,[3] 6.6 million individuals naturalized and were welcomed "into the fabric of our nation."[4] These 6.6 million individuals completed a highly detailed application form that is so sweeping in its inquiries that it can easily lead applicants to make innocuous false statements. Such false statements may result from an applicant's fear, shame, embarrassment, vanity, or any number of innately human characteristics. The standard proposed by the government would transform these innocuous statements into predicates for exercising the immense power of the criminal denaturalization statute. This breathtaking power in the hands of an aggressive prosecutor would

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[3] 18 U.S.C. § 1425(a) has a statute of limitations of ten years. *See* 18 U.S.C. § 3291 ("No person shall be prosecuted, tried, or punished for violation of sections 1423 to 1428 . . . unless the indictment is found or the information is instituted within ten years after the commission of the offense."). It is not uncommon for the government to charge section 1425 and not the underlying predicate where the statute of limitations on the underlying statute has run. *See, e.g.*, *United States v. Mensah*, 737 F.3d 789, 794 n.8 (1st Cir. 2013) ("Mensah was not charged with violating section 1015 because the statute of limitations had run on that offense by the time the government completed its investigation."); *see also United States v. Chahla*, 752 F.3d 939, 946 n.6 (11th Cir. 2014) ("It appears that the government charged the Chahlas under 18 U.S.C. § 1425(a) instead of the statute generally used to prosecute marriage fraud, 8 U.S.C. § 1325(c), because the statute of limitations for the latter had run. *Compare* 18 U.S.C. § 3291 (providing a ten-year statute of limitations for violations of § 1425) *with* 18 U.S.C. § 3282(a) (establishing a five-year statute of limitations for statutes, like § 1325, that do not provide otherwise).").

[4] Naturalization Fact Sheet, United States Citizenship and Immigration Services, https://www.uscis.gov/news/fact-sheets/naturalization-fact-sheet (last visited Feb. 28, 2017).

threaten the stability of countless naturalized citizens and is far beyond the sanction authorized by the statute.

### A. The government's proposed standard must be examined in light of the immense power it vests in the most aggressive prosecutor.

The Attorney General and United States Attorneys retain "broad discretion" to enforce the Nation's criminal laws. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (internal quotation omitted). "The presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

The government's argument in this case must be considered in light of the power it vests in the most aggressive prosecutor. *See, e.g., Bond v. United States*, 134 S.Ct. 2077, 2090 (2014) (rejecting "boundless reading" of a statutory term given "deeply serious consequences" that reading would entail); *Stenberg v. Carhart*, 530 U.S. 914, 917 (2000) (considering the possibility of some prosecutors leveraging the full scope of

the criminal statute); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 at n.10 (1987) (expressing concern for when "the parties potentially subject to [proposed prosecutorial] power would include the entire population"); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (Blackmun, J., dissenting) (imagining an "aggressive" prosecutor under the majority's standard). This is especially important with statutes that affect the foreign born where prosecutorial priorities can shift over time.[5] Should materiality be deemed irrelevant to the 18 U.S.C. § 1425(a) inquiry, new prosecutorial priorities, or the decisions of an aggressive individual prosecutor, will be free to target naturalized citizens whose only misstep was an immaterial false statement. The question in this case is whether section 1425(a) grants such immense power.

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[5] For example, prosecutions under criminal immigration laws for illegal entry have climbed 182% over the past ten years and 6407% over the past twenty years. *See* Transactional Records Access Clearinghouse, Criminal Prosecutions for Illegal Entry Up, Re-Entry Down (as of May 2016), http://trac.syr.edu/immigration/reports/430/ (last visited Feb. 28, 2017). Similarly, prior to this Court's ruling in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), some prosecutors adopted an aggressive posture on the elements of aggravated identity theft to prosecute noncitizen workers. *See* Peter Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Law*, 32 Seattle U. L. Rev. 651 (2009).

### B. The naturalization application seeks virtually limitless and deeply personal information that may lead to immaterial misstatements.

The naturalization application form, known as the N-400,[6] is so broad that it can easily lead to immaterial misstatements. The form demands a vast range of information including names and addresses of parents, spouses, and children, as well as the applicant's travel, civic activities, criminal history, residences, employment, education, political and organizational affiliations, taxes, and a range of behaviors.[7] Some questions are time-limited ("Where have you lived during the last five years?") while others seek cumulative information from the duration of an applicant's entire life ("Have you **EVER** been a member of, involved in, or in any way associated with, any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world?") (emphasis original). Many questions include expansive terms ("Have you **EVER** committed,

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[6] The current version of the naturalization form is available at https://www.uscis.gov/n-400 (last visited Feb. 28, 2017). Past versions of the form have also sought expansive information. *Amici* are not questioning here the authority of the agency to ask for such information, but note that the more expansive the form, the more likely it is to lead to immaterial misstatements.

[7] 8 C.F.R. § 1316.10(a)(1) requires that all applicants for naturalization bear the burden of demonstrating good moral character for the statutorily prescribed period. 8 C.F.R. § 1316.10(a)(2) provides authority for immigration authorities to consider conduct from beyond the statutorily prescribed period of five years when conducting the good moral character inquiry.

assisted in committing, or attempted to commit, a crime or offense for which you were **NOT** arrested?") (emphasis original). Many questions list terms that indicate less serious activity next to terms that are very serious (asking whether one was "**EVER**" involved with "trying to hurt, a person on purpose" in the same question that asks about involvement in genocide and torture) (emphasis original). The form requires that applicants submit additional information, such as information that does not fit within the space given on the form or an explanation for a question to which the applicant answered "yes," on additional sheet(s) of paper. Correctly filled out, the application is likely to be far longer than 21 pages.

Because of the N-400's length and complexity, many individuals seek assistance in completing the applications: people enlist spouses, partners and family members, employ translators, and attend citizenship drives[8] where volunteers help applicants fill out parts or all of the form. The fact that many applicants are not alone when they fill out the form, coupled with the fact that the form seeks both intimate details and information from the entirety or large portions of one's life, create an environment in which individuals may shape responses on the N-400 in ways that are not material to their eligibility for citizenship.

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[8] The New Americans Campaign, one of many campaigns to assist applicants in the naturalization process, has more than one citizenship drive per day. *See* http://newamericanscampaign.org/events (last visited Feb. 28, 2017).

Applicants may well omit details perceived as childish, irrelevant or embarrassing.[9] Applicants may answer "no" to questions for which answering "yes" might make them feel ashamed and embarrassed because of their relationship with or perception of the volunteer helping them with the form.[10] Applicants may leave out information about their participation or viewpoint on contentious political issues for fear of offending others.[11] Applicants may provide inaccurate information about their height, weight, hair color, or other personal physical truths over which vanity or embarrassment prevails. None of these omissions or misstatements are per se material to the procurement of immigration benefits, and yet all would become criminal acts warranting prison and denaturalization under the government's proposed standard.[12]

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[9] *See generally* Erving Goffman, The Presentation of Self in Everyday Life (Anchor/Doubleday 1959).

[10] *See generally* Mark R. Leary, Self-presentation: Impression Management and Inter-personal Behavior (Westview Press 1995).

[11] Social scientists have observed that survey participants may conceal their true preferences because of perceptions that their true opinions run counter to perceived societal norms. *See generally* Brian D. Silver, Barbara A. Anderson & Paul R. Abramson, *Who Overreports Voting?* 80 Am. Pol. Sci. Rev. 613-24 (1986); C. Kirk Hadaway, Penny Long Marler, and Mark Chaves, *What the Polls Don't Show: A Closer Look at US Church Attendance*, 58 Am. Soc. Rev. 741-52 (1993).

[12] In addition, many questions include terms that an applicant might not understand, such as what constitutes a crime for which you were not arrested. Under the government's standard, a defendant could be forced to take the stand simply to explain the misunderstandings underlying an immaterial inaccurate statement.

### 1. Two areas of the naturalization application – sections seeking information about organizational affiliations and criminal acts – illustrate how questions are framed so broadly that they are conducive to innocuous false statements.

Questions 9, 22 and 23 on the naturalization application illustrate how the form phrases questions in such a broad way that they are conducive to innocuous false statements. These questions ask for answers that span the applicant's lifetime and are worded to include almost an infinite array of associations and conduct.

- Part 12, Question 9A asks: "*Have you EVER been a member of, involved in, or in any way associated with, any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world?*" Part B then asks applicants who answered "yes" to Part A to "*provide the information*" in a chart seeking "*Name of the Group*", "*Purpose of the Group*" and "*Dates of Membership*." Part B also asks applicants to "*provide any evidence to support your answers.*"

The scope of the question is breathtaking; it contains three catchall clauses ("in any way associated with", "or similar group" and "in any other location in the world"), and asks for information spanning the applicant's entire life. No definitions of the means of participation (member, involvement, association) or the associations themselves (organization, association,

fund, foundation, party, club, society, or similar group) are included, making the potential list near infinite. It is not clear whether the question seeks information about charitable donations, grade school clubs, intramural sports teams, tenant associations, and other seemingly trivial involvement or groups.

If an applicant were to omit associations under the assumption that they were too trivial, irrelevant, fleeting, or minor to rise to the significance of the application, the applicant's liberty and citizenship would be threatened by the immense prosecutorial power the government seeks. Similarly, if an applicant were to leave out information about participation in a group committed to the peaceful advancement of certain populations or viewpoints considered deeply controversial (reproductive freedoms, LGBTQ rights, etc.), the omissions could be reached by the government's claimed prosecutorial power.

- Part 12, Question 22 asks: "*Have you **EVER** committed, assisted in committing, or attempted to commit, a crime or offense for which you were **NOT** arrested?*"

Again, the question seeks information from an applicant's entire life. Notably, this question is not limited to crimes, but reaches "offenses" which could include an array of quotidian behaviors that were not even marked by an arrest or a citation. Read literally, this question asks for every time the person drove over the speed limit, littered, rode a bicycle on a sidewalk,

engaged in underage drinking, failed to separate recyclables, or jaywalked. These petty offenses are sometimes the subject of citations or tickets that, like traffic citations, do not require arrests or court appearances.

- Part 12, Question 23 asks: "*Have you **EVER** been arrested, cited or detained by any law enforcement officer for any reason?*"

Applicants may well fail to list offenses they perceive as too petty to list or may fail to list times they were stopped by a law enforcement officer not understanding it constituted a formal citation or detention.

**2. The naturalization application generally asks questions about a broad range of personal information that could also lead to innocuous false statements.**

The naturalization application asks for extensive detailed information about the applicant, family members, prior marriages, travel, and employment. Applicants answering these questions are only human and their sense of self, as well as the context in which they are answering the questions, may lead to innocuous and immaterial misstatements.

- Part 2, Question 3 asks applicants to list "*other names you have used since birth, including nicknames, aliases, and maiden name, if applicable.*"

An applicant could fail to list a nickname, particularly if a nickname is embarrassing or from a remote

period of the person's life. Applicants could infer from the inclusion of "aliases" and "maiden name" in the list of information sought a certain level of required formal/legal significance to any names listed, and omit more informal nicknames. Although some nicknames might be material because they link an individual to problematic behavior, others would be immaterial.

- Part 5, Question 1 asks: "*Where have you lived during the last five years? Provide your most recent residence and then list every location where you have lived during the last five years. If you need extra space, use additional sheets of paper.*"

An applicant could list someone else's address in order to facilitate receipt of notices or due to shame if, for example, the applicant lives in a homeless shelter or with parents as an adult. An applicant could fail to list a past residence that was shared with a prior romantic partner – a detail upon which the applicant's current partner and application assistant may not look favorably. Omitting residences could lead participants to exaggerate the duration of their other residences.

- Part 7 asks applicants to check boxes to identify their "*Ethnicity,*" "*Race,*" "*Height (in inches),*" "*Weight (in pounds)*", "*Eye color,*" and "*Hair color.*"

Applicants could fail to disclose their true hair or eye color (if they color their hair and/or have colored contact lenses), and could embellish their height and

understate their weight. They could do so out of embarrassment or attraction with regard to their application assistant, vanity, or other self-image issues.

- Part 8 asks about employment and schools and instruct applicants: "*List where you have worked or attended school full time or part time during the last five years. Provide information for the complete time period. Include all military, police, and/or intelligence service. Begin by providing information about your most recent or current employment, studies, or unemployment (if applicable). Provide the locations and dates where you have worked, were self-employed, were unemployed, or have studied for the last five years. If you worked for yourself, type or print 'self-employed.' If you were unemployed, type or print 'unemployed.' If you need extra space, use additional sheets of paper.*"

An applicant could fail to disclose a period of unemployment, out of shame and embarrassment. An applicant could fail to disclose menial, piecemeal work (babysitting, dog-walking, etc.), believing those jobs to be too insignificant or irrelevant.

- Part 10 of the N-400 asks about marital history (current marital status, number of marriages, address of current spouse, information about previous spouses, etc.).

An applicant could list the same address for the spouse's home because they are physically separated but working on reconciling and believes that they will reconcile. Evidence of past marriages that have been

annulled or terminated could be difficult to gather, or the details difficult to recollect or shameful, and so an applicant may omit them.

- Part 12, Question 5 asks: "*Have you **EVER** been declared legally incompetent or been confined to a mental institution?*"

While being declared legally incompetent may be material to the naturalization process, confinement at some point in the past may be both a shame-inducing and immaterial phenomenon that applicants might hesitate before disclosing.

- Part 12, Question 14 asks: "*Were you **EVER** involved in badly hurting, or trying to hurt, a person on purpose?*"

An applicant may fail to disclose a schoolyard fight, believing it to be irrelevant or not surpassing a threshold of severity implied by the question (that also asks about involvement in genocide and torture).

- Part 12, Question 19 asks: "*Did you **EVER** receive any type of military, paramilitary (a group of people who act like a military group but are not a part of the official military), or weapons training?*"

An applicant may read the military/paramilitary clauses to limit the question to specific contexts, and omit being trained at a shooting range in a gun-friendly state.

A prosecutor scanning a past naturalization application therefore has ample opportunity to find innocuous false statements that in many cases would not have been in any way material to the granting of citizenship. The intimate and expansive nature of information sought by the application can provoke shame, embarrassment, or a sense that certain details are simply irrelevant. Although there may well be cases where one of these misstatements would be material, a rule that ignores materiality would allow an aggressive prosecutor to seize on any one of these misstatements to meet the government's burden of proof to obtain a verdict of guilty, and strip a person of citizenship.

## II. The criminal denaturalization statute requires that a false statement be material as is the case with civil denaturalization.

### A. The Sixth Circuit's application of a *lower* substantive standard for criminal denaturalization as compared to civil denaturalization is unprecedented.

All parties agree that if a court is to order denaturalization in a civil proceeding under 8 U.S.C. § 1451(a) on the ground that citizenship has been procured through concealment or misrepresentation of some fact, then the government must prove that such fact is material. This Court resolved that question unequivocally in *Kungys v. United States*, 485 U.S. 759, 767 (1988). In the proceedings below, the District Court delivered jury instructions which permitted the jury to

conclude that Petitioner could be denaturalized on the basis of false statements in her application for naturalization even if such statements were not material. Pet. App. 83a-89a. The Sixth Circuit has blessed these instructions on the ground that "Congress has created two alternative approaches to denaturalization, one civil and one criminal." *United States v. Maslenjak*, 821 F.3d 675, 691 (6th Cir. 2016).

The civil approach, under section 1451(a), to revoke citizenship for a misrepresentation would require the government to prove materiality. *Kungys*, 485 U.S. at 767. The government here, however, claims that it can circumvent any showing of materiality by pursuing the "other approach." That path, under 8 U.S.C. § 1451(e) is criminal in nature insofar as it applies only in the case of a criminal conviction under 18 U.S.C. § 1425(a) and does not, according to the Sixth Circuit, require the government to prove materiality. Thus, the Sixth Circuit has, in essence, read the Immigration and Nationality Act ("INA") to establish a *lower* substantive standard for criminal denaturalization than civil denaturalization.

In what might be thought of as a "seesaw" interpretation of the INA, the Sixth Circuit envisions Congress here to be trading procedural and substantive requirements off one another. The Sixth Circuit provides no authority for this highly novel interpretation of the relationship between substance and procedure in the INA.

Clearly, if a sanction were of the gravity to require criminal process, Congress would be constitutionally

prohibited from stripping that process and attempting to make up for the procedural deficiencies by heightening the substantive elements the government had to prove. Going in the other direction, nothing would constitutionally prohibit Congress from granting criminal process in the case of a sanction that did not require it.

We cannot, however, identify *any* instance in which Congress applies simultaneously a civil and criminal approach with respect to the very same sanction and weighs substantive and procedural components off one another, as the Sixth Circuit suggests is the case here. That Congress simply does not do this is consistent with the concurrence below, where Judge Gibbons noted "[n]or have I located any analogous context in which the elements of a crime are less onerous than the elements of the related civil penalty proceeding." 821 F.3d at 697. It is thus highly unlikely that Congress would have *lowered* the substantive standard for denaturalization under section 1425(a) without some explicit reference to the fact.

A far more plausible interpretation of the denaturalization statute is that Congress meant the standard for civil denaturalization, including the requirement that materiality be proven for misrepresentations, to function as a floor. Should denaturalization occur within the criminal path, the defendant would of course be afforded the heightened procedural protections that are due. But the government's substantive burden could be no lower than would be required in a civil case.

### B. The structural connection between civil and criminal denaturalization is best understood as serving the goal of judicial parsimony.

As opposed to the Sixth Circuit's approach, a far more reasonable interpretation of the structural role of section 1451(e) within the broader set of laws dealing with immigration and nationalization is that Congress simply wished to serve the goal of judicial parsimony. Criminal convictions under section 1425(a) will frequently arise in circumstances where the underlying facts would support denaturalization through a civil proceeding under section 1451(a). Where that is the case, there would be little to gain in forcing the government to bring a separate civil case to prove the requisites for denaturalization. Conversely, however, if the underlying facts do not support denaturalization under section 1451(a), there would be no basis to order denaturalization under section 1451(e).

The present case centers on misrepresentations in a denaturalization application. When one considers the fact that eligibility for naturalization, and retention of citizenship thereafter, is wholly determined by facts up to the time of the naturalization grant, one can immediately see that the Sixth Circuit's approach produces truly anomalous results.

As discussed in Part I of our brief, there are many ways in which an applicant for naturalization might state immaterial untrue information on his or her application. For example, the petitioner in *Kungys* had

lied about the dates and place of his birth. There was evidence that he had created these fabrications in earlier interactions with the Nazis in order to cover his participation in the Lithuanian resistance movement. *Kungys*, 485 U.S. at 767 n.5. The petitioner claimed to have simply repeated the misrepresentations in his U.S. immigration documents, though with no particular thought that the misrepresented facts would in any way be relevant to his U.S. immigration status. *Id.* Although members of this Court disagreed on the proper meaning of "materiality," no member of the Court found these facts to be material. Justice Scalia, for the Court, wrote that there had been no suggestion that these facts were relevant to the qualifications for citizenship. *Id.* at 774.

Similarly, consider an applicant who lies about his age purely out of vanity. Or an applicant who lies about the fact that she has been married and divorced because she is embarrassed by the prospect that this might lead to revelation of and questioning about sexual abuse that she had suffered during marriage. In neither case would the underlying misrepresentation (say, the fact that somebody is 41 instead of 39 or the fact that somebody has been married and then sought divorce because of sexual abuse) constitute per se grounds for denying citizenship. If such falsehoods were sworn to in a naturalization application but then revealed in the course of the applicant's naturalization interview, the decisionmaker would have to consider whether the erroneous statements constituted grounds for denying citizenship. But the question would not be

whether there was some misstatement, but how that misstatement bore on the individual's good moral character and other qualifications for citizenship. Assuming all qualifications of citizenship have been met, the applicant should be naturalized.

Under the Sixth Circuit's approach, however, the government could come back at some later point in time and seek to denaturalize such a citizen by bringing a criminal charge under section 1425(a) on the theory that the defendant had told an immaterial falsehood during the naturalization process. This would be a truly bizarre outcome especially when the government had full knowledge of the falsehood at the time of the grant of citizenship. Such an unjustified result can be easily avoided under the approach we advance here, whereby the civil standard sets a substantive floor and the criminal denaturalization path under section 1451(e) is understood simply to serve a goal of judicial parsimony in cases where the civil standard has been effectively proven in a criminal proceeding.

In the hypothetical described above, there would be no basis for denaturalization in a civil proceeding set out in section 1451(a) based on a misrepresentation, given the requirement of materiality under *Kungys*. Parsimony is a virtue only where it leads to correct outcomes. Ordering denaturalization in a criminal proceeding under section 1451(e) on these facts would thus be precluded under our proposed reading of the structural connection between civil and criminal denaturalization.

### C. Implying a materiality standard for false statements under section 1425(a) does not lead to incongruous legal outcomes.

One of the Sixth Circuit's reasons for rejecting its sister circuits' interpretation of section 1425(a) as implying materiality is that this cannot be squared with the broader framework of laws governing the immigration process and would thus produce incongruous results. The Sixth Circuit raised three sorts of concerns about potential incongruity that would follow from implying a materiality requirement into section 1425(a). The purported incongruities drop away in each case once one takes account of the failings of the court's "seesaw" interpretation of the INA.

First, the Sixth Circuit focused on the relationship between the elements of the crime specified in section 1425(a) itself and the elements of certain of the predicate offenses that the Sixth Circuit took to be included within section 1425(a)'s ambit. Specifically, § 1425(a), in relevant part, makes it a crime to "knowingly procure . . . contrary to law, the naturalization of any person." The Sixth Circuit reads "contrary to law" here to cover "all laws applicable to naturalization." 821 F.3d at 686. This would mean the phrase includes not just the INA but also criminal offenses related to immigration covered in Title 18. This is to be contrasted with the Ninth Circuit's approach in *United States v. Puerta*, 982 F.2d 1297 (9th Cir. 1992), which the Sixth Circuit suggested interpreted the phrase "contrary to

law" in section 1425 to mean "contrary to the INA" only. 821 F.3d at 687.

Notably, under the Sixth Circuit's reading of the scope of section 1425(a) it would include as a predicate crime 18 U.S.C. § 1015(a), which criminalizes, *inter alia*, false statements in naturalization proceedings. Further, the Sixth Circuit concluded that section 1015(a) does not have a materiality requirement. 821 F.3d at 687. The Sixth Circuit found it incongruous that a predicate crime under section 1425(a) would not require materiality, while section 1425(a) itself would. *Id.* at 688.

We agree with Petitioner's counsel that section 1015(a) actually does require proof of materiality for false statements. *See* Pet. Brief at 30-37. In that case the seeming incongruity identified by the Sixth Circuit drops away. But even if the Sixth Circuit is correct in its reading of section 1015(a), there is no incongruity so long as one rejects the Sixth Circuit's unjustified interpretation of the INA as involving a lower substantive standard for criminal as compared to civil denaturalization.

It is a false dichotomy to suggest that "contrary to law" in section 1425(a) must mean either "contrary to the INA" (i.e., the Ninth Circuit approach) or "contrary to the INA or other criminal offenses related to immigration" (i.e., the Sixth Circuit approach). A far more plausible interpretation of "contrary to law" under section 1425 is that naturalization has been procured in contravention of the underlying substantive floor set

by the civil standard. At the very least, this will include naturalization that is "contrary to the INA." It could also include cases in which there is a violation of a statute under Title 18 related to immigration. The talisman here, though, should simply be whether the factual record that would support the "contrary to law" element for a conviction under Title 18 would have supported denaturalization in a civil case under section 1451(a).

The Sixth Circuit reads "contrary to law" in section 1425(a) as if it were shorthand for a laundry list of particular statutory provisions which Congress did not expressly fill in but which courts must infer. Thus, a provision like section 1015(a) is either in or out. That rigid interpretation of the provision, however, is simply an offshoot of the Sixth Circuit's mistaken view on applying a lower substantive standard for criminal denaturalization. Once one acknowledges that the civil standard sets a substantive floor, it becomes readily apparent that "contrary to law" cannot be interpreted in such a rigid manner. The substantive floor established by the civil standard might be met in the proof of certain criminal offenses in Title 18, but one cannot conclude the matter categorically on a section-by-section basis. It depends, rather, on the factual record that the government is able to muster in any particular criminal case.

Second, the Sixth Circuit highlighted the fact that materiality is not required across the board in the civil standard for denaturalization. The Sixth Circuit thus concluded that "[r]equiring proof of materiality under

18 U.S.C. § 1425(a) is incompatible" with these other federal provisions which provide a civil path to denaturalization absent a showing of materiality under section 1451(a).

Again, the proper reading of section 1425(a) is that, at a minimum, it incorporates the substantive civil denaturalization standard as a floor. The question presented to this Court relates to application of section 1425(a) based on misrepresentations in the naturalization application. This clearly tracks the portion of section 1451(a) where this Court required a showing of materiality in *Kungys*.

Third, the Sixth Circuit concluded that if materiality were required under section 1425(a), then "the government would have little incentive to ever pursue the denaturalization of a naturalized citizen for making false statements through a criminal indictment under 18 U.S.C. § 1425." 821 F.3d at 692. The idea here is that the government would face the same substantive proof hurdles, but with the heightened procedural protections afforded a criminal defendant. The Sixth Circuit seemed to suggest in this regard that section 1425 would have no point if it implies materiality because the government would not proceed under the section.

This again is to misconstrue the relationship between civil and criminal denaturalization. The point of section 1425 is not simply to provide an alternate path to denaturalization. The point is to set out criminal sanctions in the form of imprisonment and fines, quite aside from denaturalization. It is the government's

judgment that those additional sanctions are appropriate, as opposed to the collateral consequence of denaturalization under section 1451(e), that would explain the government's incentive to choose a suit that requires additional process.

## CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Court of Appeals for the Sixth Circuit.

March 2017

Respectfully submitted,

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